



June 7, 2019

Ex Parte Notice

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Petitions for Declaratory Ruling Filed by BellSouth and Alabama 911 Districts Regarding the Meaning of the Commission's Definition of Interconnected VoIP in 47 C.F.R. § 9.3 and the Prohibition on State Imposition of 911 Charges on VoIP Customers in 47 U.S.C. § 615a-1(f)(1), WC Docket No. 19-44*

Dear Ms. Dortch:

On June 5, 2019, Christopher Heimann and Matthew Nodine (in person) and Mark Lewis (telephonically), all of AT&T; Scott H. Angstreich (Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C.) representing AT&T; Joe Cavender (in person) and Tim Boucher (telephonically) of CenturyLink; Beth Choroser of Comcast; Diana Eisner of Frontier; Robert Morse of Verizon; Thomas Whitehead of Windstream; Jennifer McKee of NCTA; and Mike Saperstein (telephonically) of USTelecom; met with Terri Natoli, Michael Ray, and Michele Berlove of the Wireline Competition Bureau; Erika Olsen and Elizabeth Cuttner of the Public Safety and Homeland Security Bureau; Becky Chambers and Meg Schumm, interns with the Wireline Competition Bureau; and Sean Saper, an intern with the Public Safety and Homeland Security Bureau. During the meeting, the companies and associations discussed the primary jurisdiction referrals entered in the Alabama, Florida, and Pennsylvania litigation,¹ as well as BellSouth's and the Districts' petitions for declaratory ruling and the companies' and associations' comments in support of BellSouth's petition and in opposition to the Districts' petition.

1. The companies and associations urged the Commission to issue a prompt declaratory ruling interpreting 47 U.S.C. § 615a-1(f)(1) to preempt state and local 911 statutes and ordinances that, on their face or in application, discriminate against VoIP customers as

¹ AT&T is a defendant in cases in which primary jurisdiction referrals have been entered in all three jurisdictions. CenturyLink, Frontier, Verizon, and Windstream are defendants in both Florida and Pennsylvania cases. Comcast is a defendant in the Pennsylvania case.

compared to customers buying non-VoIP wireline services. That is, the Commission should declare that the 911 “fee or charge” a state statute or local ordinance imposes on VoIP customers would “exceed the amount of any such fee or charge applicable to the same class of subscribers to telecommunications services” — and, therefore, be preempted — in the following circumstances: (1) the state statute or local ordinance sets a higher per unit VoIP 911 charge than the per unit 911 charge for non-VoIP wireline services²; (2) the state statute or local ordinance caps the total number of 911 charges due each month from customers buying non-VoIP wireline services, but sets a higher cap — or sets no cap at all — on the number of 911 charges due each month from customers buying VoIP services; and (3) the state statute or local ordinance calculates the number of 911 charges due from customers buying non-VoIP wireline services based on the number of simultaneous calls to the PSTN (including 911)³ those customers can place, but calculates the number of 911 charges due from customers buying VoIP service based on their assigned or active telephone numbers, even if the customers cannot simultaneously place calls to the PSTN (including 911) using all those telephone numbers.

The Commission should thus reject the Alabama Districts’, Phone Recovery Services’, and others’ narrow reading of § 615a-1(f)(1) — under which that statute preempts *only* those state statutes and local ordinances that set a higher per unit VoIP 911 charge than the per unit 911 charge for non-VoIP wireline services.⁴ The Commission should also note that there may be additional ways in which a state statute or local ordinance could impose 911 charges that discriminate, whether facially or in application, against VoIP services. But the Commission need not address those possibilities now: the possibilities listed above as numbers 2 and 3 cover the ways that plaintiffs in pending 911 charge litigation have alleged that applicable state statutes or local ordinances discriminate against VoIP customers.

2. The companies and associations stressed that the Commission is not being asked to declare that any particular state 911 statute or local 911 ordinance is preempted. That is because the companies and associations are not aware of *any* statute or ordinance that expressly adopts a discriminatory rule for calculating the 911 charges due from VoIP customers.⁵

² The Districts and other plaintiffs in 911 charge litigation agree that § 615a-1(f)(1) would preempt such a state statute or local ordinance. *See* Districts Reply 13-14; Charleston/Richland South Carolina Comments 4.

³ By “calls to the PSTN (including 911),” we refer to any call to a regular 7- or 10-digit North American Numbering plan telephone number or to 911 (or other similar special purpose codes, like 411).

⁴ *See, e.g.,* Districts Pet. 36-39; Districts Reply Comments 12-17; Charleston/Richland South Carolina Comments 2-6. At a recent hearing in the Florida cases, counsel for PRS, who also represents the Alabama Districts, stated that “PRS’s counsel was already intimately involved in the briefing that had occurred before the FCC” — presumably referring to the Districts’ filings — and, therefore, saw no need to “dump additional paper on the FCC under the name of PRS.” Transcript at 50:18-51:9, *State of Fla. ex rel. Phone Recovery Servs., Inc. v. Verizon Bus. Glob. LLC*, Nos. 2016-CA-000062 *et al.* (Fla. Leon Cty. May 15, 2019) (“Florida Hr’g Tr.”).

⁵ However, numerous States have expressly adopted a *non-discriminatory* rule for calculating the 911 charges due from VoIP customers. *See* AT&T Ex Parte 2-3 (May 13, 2019) (describing Alabama, Georgia, and Pennsylvania 911 laws).

Resolving the dispute about the meaning of § 615a-1(f)(1) — which is presented in each of the three cases in which courts entered primary jurisdiction referrals and which the comments show is presented in other pending 911 charge litigation as well — will assist courts as they interpret 911 statutes and ordinances.

Of course, if those courts conclude that a 911 law unambiguously does *not* adopt a discriminatory rule for calculating the 911 charges due from VoIP customers, the court will have no reason to consider preemption or § 615a-1(f)(1). That is what happened in a case in Alabama, where a state court held that Alabama’s 911 law in effect through September 2013 required both VoIP and non-VoIP customers to pay 911 charges based on the extent to which the customer can make simultaneous calls to the PSTN (including 911). Having interpreted Alabama’s law *not* to discriminate against VoIP customers, the court had no reason to address the parties’ arguments about the preemptive scope of § 615a-1(f)(1).⁶

But if a court instead finds a 911 law is ambiguous and could reasonably be interpreted to adopt a discriminatory rule, the court would then apply the canon of construction that ambiguous statutes should be construed, wherever possible, so that they are not preempted.⁷ At that point, the court would turn to § 615a-1(f)(1) and to the Commission’s interpretation of that provision. Not only would the court give *Chevron* deference to the Commission’s interpretation of this federal statute that it administers,⁸ but also trial courts would lack jurisdiction to review the merits of the Commission’s interpretation of § 615a-1(f)(1); instead, exclusive jurisdiction to review that interpretation would lie with a federal court of appeals.⁹ A court applying the canon of construction and the Commission’s interpretation of § 615a-1(f)(1) should resolve any ambiguities in a 911 law by *rejecting* interpretations — such as those offered by the plaintiffs in the pending 911 charge litigation — that would cause that 911 law to discriminate against VoIP customers.¹⁰

3. The companies and associations also explained that the dispute about the meaning of § 615a-1(f)(1) is part of the primary jurisdiction referrals. In the Alabama case, BellSouth expressly sought referral of the dispute about the meaning of § 615a-1(f)(1), and the federal court

⁶ See AT&T Reply 6 (citing Order, *Madison Cty. Commc’ns Dist. v. ITC DeltaCom, Inc.*, No. CV 2014-904855.00 (Ala. Cir. Ct. Jefferson Cty. Apr. 25, 2018)).

⁷ See, e.g., *Zauflik v. Pennsbury Sch. Dist.*, 104 A.3d 1096, 1103 (Pa. 2014) (“Courts endeavor to give statutes a constitutional interpretation if that is reasonably possible.”); *Lewis v. Leon Cty.*, 73 So. 3d 151, 153 (Fla. 2011) (“[S]tatutes come clothed with a presumption of constitutionality and must be construed whenever possible to effect a constitutional outcome.”); *Henderson v. Evans*, 232 S.E.2d 331, 333-34 (S.C. 1977) (“Constitutional constructions of statutes are not only judicially preferred, they are mandated; a possible constitutional construction must prevail over an unconstitutional interpretation.”).

⁸ See, e.g., *Glob. Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 550 U.S. 45, 55 (2007).

⁹ 28 U.S.C. § 2342.

¹⁰ In the unlikely event a court were to find that a 911 law *unambiguously* discriminated against VoIP customers, that court would then hold that § 615a-1(f)(1) preempts that 911 law to the extent of the discrimination. Again, the companies and associations are not aware of *any* 911 statute or ordinance that expressly adopts a discriminatory rule for calculating the 911 charges due from VoIP customers.

granted BellSouth's motion in full.¹¹ That referral, therefore, included the § 615a-1(f)(1) dispute. Moreover, on March 5, 2018 — just days after granting the primary jurisdiction referral — the court held a status conference at which the Magistrate Judge noted that she had not posed specific questions for the Commission to answer and stated that she would prefer not to do so given the complexities of the issues. Counsel for both the Districts and BellSouth responded that neither objected to the court's decision not to pose such questions. Therefore, the district court has left it to the Commission's discretion to identify the best way to resolve the federal law issues raised in the Alabama case and referred to the Commission.

In the Florida case, the telephone companies moving for a primary jurisdiction referral also raised the dispute about § 615a-1(f)(1) as a basis for staying that case under the primary jurisdiction doctrine. The Florida state court also granted that motion in full. And in the Pennsylvania case, the defendants urged the state court to apply the primary jurisdiction doctrine for the same reasons as in Alabama and Florida. That court, too, granted the motion in full. Those two primary jurisdiction referrals are also properly understood to be part of this docket. Because AT&T is a defendant in all three jurisdictions and counsel for Phone Recovery Services in Florida and Pennsylvania was already working with BellSouth's counsel and the Commission's staff to structure this docket, the parties in the Florida and Pennsylvania cases did not approach the Enforcement Bureau to initiate separate Commission proceedings based on those referrals. Instead, Commission staff, counsel for the Districts and Phone Recovery Services, and counsel for BellSouth — who, in turn, consulted with counsel for other Florida and Pennsylvania defendants — all worked together to develop a proceeding that would address the Alabama "district court's primary jurisdiction referral, as well as primary jurisdictional referral decisions in two other courts": namely, Florida and Pennsylvania.¹²

The companies and associations explained further that issuing the requested declaratory ruling about the preemptive scope of § 615a-1(f)(1) will fully respond to the primary jurisdiction referrals because it will effectively moot the disputes about the meaning of the definition of interconnected VoIP in 47 C.F.R. § 9.3. As we explained in our comments, the Districts and Phone Recovery Services are only pressing their interpretation of § 9.3 because they *also* contend that state 911 laws would require a customer to pay more in total 911 charges if its service were re-classified as VoIP under that novel interpretation of § 9.3.¹³ A Commission ruling that § 615a-1(f)(1) would preempt such a state or local 911 law would moot the question whether the service a particular customer bought from a particular provider was *really* VoIP: that customer would owe the same amount of 911 charges regardless of the classification.

Resolving only the dispute about § 615a-1(f)(1) — and not resolving the mooted dispute about § 9.3 — would also be consistent with the Commission's rulings in other proceedings arising from primary jurisdiction referrals. For example, in a dispute between AT&T and All American, the Commission "dismiss[ed] . . . as moot" a number of "issues that the Court referred," because those other issues were "predicated on the assumption that Defendants

¹¹ See AT&T Comments 13.

¹² BellSouth Pet. 7; Districts Pet. 9.

¹³ See, e.g., USTelecom Comments 8; NCTA Comments 5-6.

provided a service to AT&T,” which the Commission found they “did not.”¹⁴ Here, too, the dispute about the meaning of § 9.3 is predicated on the assumption that the mere classification of a service as VoIP rather than, for example, PRI can lawfully result in a customer having to pay more in total 911 charges. Interpreting § 615a-1(f)(1) to negate that critical assumption thus fully responds to the primary jurisdiction referrals.

4. The companies and associations also explained that they sell VoIP products that provide business customers the ability to make a limited number of simultaneous calls to the PSTN (including 911) and that business customers buying those products may obtain a much greater quantity of telephone numbers than simultaneous outbound calls. That is because, at any given time, most of a business’s employees will not be making calls to or receiving calls from the PSTN; instead employees may be using their phones to make internal calls to other employees or doing work that does not require use of their phones. Telephone companies help their customers purchasing these products to determine the appropriate ratio of simultaneous outbound calls to employees for their business.

One such VoIP service is AT&T Corp.’s IP Flexible Reach service, in which “[c]ustomers choose the calling capacity they require in units of Concurrent Calls, which are similar to simultaneous calls and can be engineered using standard voice traffic tools or by using the Customer’s existing voice channel capacity.”¹⁵ Thus, a customer who purchased IP Flexible Reach with 23 Concurrent Calls could make up to 23 simultaneous calls to the PSTN (including 911). That would be true whether the IP Flexible Reach customer also obtained 23 telephone numbers for use with that service or 200 telephone numbers.

Another is Comcast’s VoIP primary rate interface (“PRI”) service.¹⁶ This VoIP PRI service uses IP technology to provide customers with up to 23 voice-capable paths, each of which is configurable for one-way calling (inbound-only or outbound-only) or two-way calling. If all 23 voice-capable paths are configured for outbound calling, Comcast’s VoIP PRI service can support a maximum of 23 concurrent outbound phone calls to the PSTN (including 911), irrespective of the number of telephone numbers associated with the service.

Frontier offers IP Connect service, which is a VoIP service that allows customers to customize their inbound and outbound call capacity — that is, capacity simultaneously to receive

¹⁴ Memorandum Opinion and Order, *AT&T Corp. v. All-Am. Tel. Co.*, 30 FCC Rcd 8958, ¶ 21 (2015); *see also* Declaratory Ruling, *Petitions of Sprint PCS & AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges*, 17 FCC Rcd 13192, ¶ 1 (2002) (issuing a declaratory ruling resolving one of two questions the court referred but finding it “premature,” in light of that resolution, “to address the court’s second question”).

¹⁵ AT&T Business Service Guide: AT&T Business Voice over IP (BVoIP) Services 53 (June 7, 2019). This service guide is available at the link titled “AT&T Business Voice over IP Services” at the Service Guide Library, AT&T Business Service Guide. *See* <https://serviceguidenew.att.com/>. AT&T described this service in its comments (at 19 n.27).

¹⁶ *See* Comcast Business, *PRI Trunks*, <https://business.comcast.com/learn/phone/pri-trunks>.

calls from or to make calls to the PSTN (including 911) — in increments of one calling unit.¹⁷ Frontier business customers buying IP Connect service can and do obtain more telephone numbers than outbound calling capacity.

VoIP services that offer customers the ability to make a specific number of simultaneous calls to the PSTN (including 911) are an attractive replacement for legacy services such as PRI. And they highlight the discrimination inherent in the Districts' position here. According to the Districts, a business customer in Birmingham, Alabama, that in January 2013 purchased one PRI and obtained telephone numbers for each of its 200 employees would have paid only 23 911 charges each month. But if that customer replaced that PRI in February 2013 with one of the VoIP services listed above while purchasing the ability to make only 23 simultaneous calls to the PSTN (including 911), that customer would — according to the Districts — have had to pay 200 911 charges each month: one for each telephone number. And because the per unit 911 charge for businesses in Birmingham was \$5.08, that customer would have faced a *nearly \$11,000 annual increase* in its phone bill, due entirely to the discriminatory regime that the Districts contend Alabama had in place through September 2013.

Of course, if that customer had instead switched from a single PRI to a VoIP service that allowed each of its 200 employees simultaneously to make a call to the PSTN (including 911), nothing in § 615a-1(f)(1) would preempt a state law merely because it required the customer to pay more in 911 charges as a result of that change. Indeed, most (if not all) state 911 laws require a customer who purchases nine PRIs configured to carry 200 simultaneous calls to the PSTN to pay more in total 911 charges than a customer who purchases only one PRI, which can be configured to carry no more than 23 simultaneous calls to the PSTN. But where a State, like South Carolina, has decided that the most a non-VoIP wireline customer should *ever* pay is 50 911 charges per month, § 615a-1(f)(1) would preempt a state law that refused to extend that same treatment to VoIP customers.

5. Finally, the companies and associations stressed the need for prompt action in resolving these petitions for declaratory ruling. The South Carolina litigation is scheduled for trial starting November 4, 2019, with summary judgment briefing scheduled to start August 13 and end September 13. A prompt Commission decision on the meaning of § 615a-1(f)(1) is necessary so that the district court can consider the Commission's interpretation of that provision when assessing the plaintiffs' claim that South Carolina's 911 statute imposes a starkly discriminatory 911 charge rule: capping non-VoIP customers at 50 911 charges per month (irrespective of quantity), but leaving VoIP customers potentially subject to thousands of monthly 911 charges.¹⁸ In addition, Phone Recovery Services and the State of Florida are using the duration of this proceeding as a basis to urge the Florida court to lift its primary jurisdiction stay, with the State arguing that the Commission "moves like molasses and may never make a decision at all"¹⁹ and Phone Recovery Services complaining that the Commission's "proceeding

¹⁷ See Frontier Business, *IP Trunking: Converged Voice and Data Services*, <https://enterprise.frontier.com/cloud-voip-phone>.

¹⁸ See AT&T Ex Parte 4 & n.4 (May 13, 2019).

¹⁹ Florida Hr'g Tr. at 20:2-4

continues with no end in sight.”²⁰ The Florida court has not yet ruled on Defendants’ motion to extend the primary jurisdiction stay.

Sincerely,



Matt Nodine
AT&T Services Inc.



Joseph Cavender
CenturyLink



Beth Choroser
Comcast



Diana Eisner
Frontier



Robert Morse
Verizon



Thomas Whitehead
Windstream



Jennifer McKee
NCTA



Mike Saperstein
US Telecom

cc: Terri Natoli
Michael Ray
Michele Berlove
Erika Olsen
Elizabeth Cuttner

²⁰ Relator’s Resp. to Def.s’ Mot. To Extend the Stay at 2, *State of Fla. ex rel. Phone Recovery Servs., Inc. v. Verizon Bus. Glob. LLC*, Nos. 2016-CA-000062 *et al.* (Fla. Leon Cty. May 9, 2019).